

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-2100

ELIZABETH M. BEHREND and BROOKSIDE
LIMITED PARTNERSHIP, upon behalf of
themselves and all others similarly
situated,

Petitioners,

vs.

GOVERNMENT NATIONAL MORTGAGE ASSOCIATION
and SAMUEL R. PIERCE, Secretary,
Department of Housing and Urban
Development,

Respondents.

SUPPLEMENTAL APPENDIX

KENNETH W. BEHREND
1320 Grant Building
Pittsburgh, PA 15219
Counsel for
Petitioners

June 28, 1983

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District Court Order dated June 7, 1982, granting Motion of Defendants to dismiss the original and amended complaints of Plaintiffs.	1(s)
District Memorandum of Judge Ziegler dated June 7, 1982.	3(s)
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ELIZABETH M. BEHREND and)
BROOKSIDE LIMITED PARTNERSHIP,)
upon behalf of themselves and)
all others similarly situated,)

Plaintiffs,)

vs.)

GOVERNMENT NATIONAL MORTGAGE)
ASSOCIATION, and SAMUEL R.)
PIERCE, Secretary,)
Department of Housing and)
Urban Development,)

Defendants.)

) Civil Action
) 81-059

ORDER OF COURT

AND NOW, this 7th day of June, 1982,

IT IS ORDERED that the motion of
defendants to dismiss the original and amended
complaints of plaintiffs be and hereby is
granted.

/S/ Donald E. Ziegler
Donald E. Ziegler
United States District
Judge

cc: Mark Aronson, Esq.
Kenneth W. Behrend, Esq.
1112 Frick Building
Pittsburgh, PA 15219

Craig R. McKay, Esq.
Assistant U.S. Attorney

Dwight Meier, Esq.
U.S. Department of Justice
P.O. Box 875
Benjamin Franklin Station
Washington, DC 20044

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GOVERNMENT NATIONAL MORTGAGE)
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PIERCE, Secretary,)
Department of Housing and)
Urban Development,)

Defendants.)

M E M O R A N D U M

Ziegler, District Judge

Presently before the court is the motion of defendants to dismiss the original and amended complaints of plaintiffs for failure to state a claim on which relief can be granted. The allegations of the complaints are vague but the theory of plaintiffs was made clear at oral argument on June 4, 1982. Plaintiffs' claim is

in the nature of a constitutional tort based on the precepts of the Fifth Amendment. Subject matter jurisdiction is extant pursuant to 28 U.S.C. § 1331 but the remaining allegations of plaintiffs as to jurisdiction are without merit. We hold that the claim is barred by the doctrine of sovereign immunity and therefore plaintiffs have failed to state a claim on which relief can be granted.

The United States, as sovereign, is immune from suit unless it expressly consents to be sued. United States v. Mitchell, 445 U.S. 535, 538 (1980). As Justice Harlan has stated: "However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune from suit." Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 410 (1970) (concurring opinion). It is true, of course, that immunity has been waived

by the Tucker Act, 28 U.S.C. § 1491, and the Federal Tort Claims Act, 28 U.S.C. § 2671. But the latter is clearly not applicable and the Tucker Act does not create a cause of action unless a substantive right otherwise exists. As the Supreme Court held in United States v. Testan, 424 U.S. 392, 401-402 (1976):

Where the United States is the defendant and the plaintiff is not suing for money improperly exacted or retained, the basis of the federal claim - whether it be the Constitution, a statute, or a regulation - does not create a cause of action for damages unless, as the Court of Claims has stated, 'that basis. . . can be fairly interpreted as mandating compensation by the Federal Government for the damage sustained.'

Plaintiff have cited no substantive right or basis that mandates compensation by the sovereign. Rather they assert that Government National Mortgage Association is an independent agency with the general capacity to "sue and be sued" and not a subordinate unit of the United

States. See, United Electric Corp. v. United States, 647 F.2d 1082, 1084 (Ct.Cl. 1981) We hold that the instant action is in reality an action against the United States and therefore subject to the defense of sovereign immunity.

The issue of GNMA's alleged independence was litigated in Lomas & Nettleton Co. v. Pierce, 636 F.2d 971 (5th Cir. 1981). There the court held that all funding of the agency emanated from the Treasury of the United States under 12 U.S.C. § § 1720(d) and 1721, and the "sue and be sued" clause 12 U.S.S. §1720 did not render the agency independent of the sovereign, since any judgment for the plaintiff must be satisfied from the Federal Treasury. The Court of Appeals agreed with the district court's conclusion of want of subject matter jurisdiction. We find the reasoning of that court to be persuasive and dispositive of plaintiffs' contention.

The allegations against the Secretary of HUD are also fatally deficient. There are no contentions that Mr. Pierce acted in any manner other than the nominal head of a governmental agency. There are no allegations that he acted extralegally. In short, plaintiffs' claim here again is in reality a suit against the United States.

As a final matter, we must determine whether we should transfer this action to the Court of Claims pursuant to 28 U.S.C. § 1406(c), despite our finding that plaintiffs' complaints must be dismissed for failure to state a claim. We think not. As urged by counsel for defendants, the Court of Claims has held that it lacks jurisdiction over non-existent claims for money damages based upon the Fifth or Fourteenth Amendments. Muehlen v. United States, 209 Ct.Cl. 690 (1976). Since this court has jurisdiction to adjudicate plaintiffs' claim under 28 U.S.C. § 1331, and we have found that claim is barred

by the doctrine of sovereign immunity, the
Rule 12(b) motion of defendants will be
granted.

DATED: June 7, 1982 /S/Donald E. Ziegler
 Donald E. Ziegler
 United States District
 Judge

cc: Mark Aronson, Esq.
 Kenneth W. Behrend, Esq.
 1112 Frick Building
 Pittsburgh, PA 15219

Craig R. McKay, Esq.
Assistant U.S. Attorney

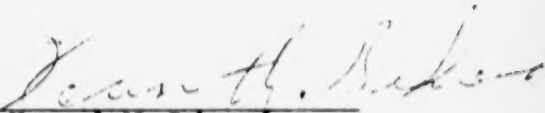
Dwight Meier, Esq.
U.S. Department of Justice
P.O. Box 875
Benjamin Franklin Station
Washington, DC 20044

CERTIFICATE OF SERVICE

I certify that I have this 29th day of June, 1983, served three copies of the within Supplemental Appendix by first class mail, postage pre-paid, upon Susan Engelman, Esquire, and upon Dwight Meier, Esquire, Department of Justice, P.O. Box 875, Benjamin Franklin Station, Washington, D.C. 20044 and that I have this 29th day of June, 1983, also served by first class mail, postage pre-paid, three copies of the foregoing Supplemental Appendix upon Craig McKay, Esquire, Room 633, U.S. Courthouse, 7th and Grant Streets, Pittsburgh, PA 15230. I have also made service upon the Solicitor General, Department of Justice, Washington, D.C. 20530, by serving three (3) copies of this foregoing Supplemental Appendix by first class mail, postage pre-paid. I

certify that all parties required to be served
have been served.

By



Kenneth W. Behrend
1320 Grant Building
Pittsburgh, PA 15219

Counsel for Petitioners

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